

In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

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| In the matter of: |) | |
| |) | |
| CHARLES W. ROGERS |) | Adversary Proceeding |
| (Chapter 7 Case <u>96-20917</u>) |) | Number <u>96-2025</u> |
| |) | |
| <i>Debtor</i> |) | |
| |) | |
| |) | |
| ANNE B. ROGERS |) | |
| |) | |
| <i>Plaintiff</i> |) | |
| |) | |
| |) | |
| v. |) | |
| |) | |
| CHARLES W. ROGERS |) | |
| |) | |
| <i>Defendant</i> |) | |

MEMORANDUM AND ORDER

This action is a complaint to determine the dischargeability of a debt pursuant to Title 11 U.S.C. Sections 523(a)(5). Defendant/Debtor, Charles W. Rogers, has filed for Chapter 7 relief and claims that his obligation owed to Plaintiff, Anne B. Rogers, is a property settlement arising out of a divorce decree and, therefore, should be discharged. Plaintiff disputes Defendant's contentions and asserts that this debt should be characterized as alimony, excepted from discharge pursuant to 11 U.S.C. Section 523(a)(5).

This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(I). Pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure, this Court held a trial on January 16, 1997, and makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

On December 25, 1977, the parties were married. They lived together as husband and wife until approximately July 1994, when they agreed to separate. Their divorce was finalized on October 28, 1994. The parties had no children together.

Debtor, Charles W. Rogers (hereinafter "Debtor"), currently resides in Brunswick, Georgia and has been working as a mortgage loan officer for the past year receiving an annual salary of approximately \$22,000.00. Over the course of his marriage to Plaintiff, Debtor performed several different jobs, including serving a term as state legislator for Glynn County, working on staff at ABC Home Health Care, working as a bank officer at Trust Company Bank, working as a salesman at Sweat's Furniture, and working as a salesman at Peter's Men's Store. During that period, Debtor's salary fluctuated greatly from approximately \$53,000.00 annually during an eighteen-month period with ABC Home Health Care between 1992-1993 to approximately \$7.00 per hour while working for Peter's Men's Store in November of 1994. Debtor does not have a college degree although he has completed two years of higher education.

Plaintiff, Anne B. Rogers, currently lives in Atlanta, Georgia and has been working as a teacher employed by the Dekalb County Board of Education while receiving an annual salary of approximately \$51,000.00. Over the course of her marriage to Debtor, Plaintiff has held comparable positions although at times she worked two jobs to support her family, including working at a 7-11 convenience store, for the Trust Company Bank, and in a clothing store. Plaintiff testified that during her marriage to Debtor she was the "primary breadwinner." Plaintiff has held a Ph.D. in education since 1988.

The central dispute in this proceeding is whether an obligation arising from the divorce decree is in the nature of support or instead is a division of property. Specifically, during their marriage, the parties acquired a condominium on St. Simons Island, Georgia. Plaintiff borrowed the \$12,000 down payment and the parties jointly financed a first mortgage. Sometime later during either 1991 or 1992, in order to consolidate their debts, the parties took out a second mortgage on the condominium. This loan was from First Georgia Savings Bank and was also a joint obligation. It is undisputed that the parties acquired the condominium as an investment. Plaintiff testified that she never lived in the condominium and used it solely as rental property.

The divorce decree (Exhibit P-1) gave the condominium title in fee simple to Plaintiff, obligated Plaintiff to pay the first mortgage and hold Debtor harmless therefrom, and obligated Debtor to pay the second mortgage and hold Plaintiff harmless

therefrom. The decree also required Debtor to satisfy the second mortgage within sixty days of the entry of the agreement. Debtor was unable to satisfy the debt as ordered although he did make a some monthly payments to First Georgia, but by December of 1995, First Georgia commenced foreclosure proceedings due to Debtor's failure to maintain payments. As a result, Plaintiff attempted to market the property and cut her losses; however, she was unable to realize more than a nominal profit from the sale after satisfying both mortgages. At the time, the debt on the second mortgage to First Georgia was \$15,796.28.

Plaintiff contends that Debtor's obligation to satisfy the second mortgage and hold Plaintiff harmless therefrom, although labeled a "equitable division of their assets," was actually in the nature of alimony, maintenance, or support and should be declared a non-dischargeable debt. Plaintiff asserts that had Debtor made his obligation payments Plaintiff would not have had to work two or three jobs to make ends meet. Plaintiff notes that if a recipient spouse needs support that a divorce decree does not explicitly provide then a so called "property settlement" is more in the nature of support than property division. *See Shaver v. Shaver*, 736 F.2d 1314 (9th Cir. 1984). Accordingly, Plaintiff requests that this Court determine Debtor's obligation to be non-dischargeable.

Debtor disputes Plaintiff's contentions and contends that this obligation is a property settlement that should not be excepted from general discharge. Debtor notes

that (1) the divorce decree itself characterized the obligation as an equitable division of property and not alimony "for any purpose," (2) Plaintiff was the "primary breadwinner," and (3) the property was only used as an investment. Thus, Debtor requests this Court to make a determination that this obligation is a property settlement and, therefore, dischargeable.

CONCLUSIONS OF LAW

In pertinent part, 11 U.S.C. Section 523(a)(5) provides,

(a) a discharge under section 727 . . . of this title does not discharge an individual debtor from any debt--

(5) to a . . . former spouse . . . for alimony to, maintenance for, or support of such spouse . . .

.

The Eleventh Circuit Court of Appeals has held that when determining the dischargeability of debts pursuant to 11 U.S.C. Section 523(a)(5) only a simple inquiry is required to determine if "the obligation can legitimately be characterized as support, that is, whether it is in the nature of support." In re Harrell, 754 F.2d 902, 906 (11th Cir. 1985). Federal law, rather than state law, controls the inquiry and, therefore, an obligation may be deemed actually in the nature of support even if is not considered support under state law. See Grogan v. Garner, 498 U.S. 279, 11 S.Ct. 654, 112 L.Ed.2d 755 (1991); In re Strickland, 90 F.3d 444, 446 (11th Cir. 1996). However, state law may be used to provide

guidance in determining whether an obligation should be considered in the nature of support pursuant to Section 523(a)(5). *See Id.* at 446; *In re Jones*, 9 F.3d 878, 880 (10th Cir. 1993).

In this case, paragraph four of the agreement attached to and adopted by the divorce decree entitled "Payment of Debts" states as follows,

(b) The Husband [Debtor] shall assume full responsibility for . . . all other debts The said debts include, but are not limited to, the following:

(i) The indebtedness to First Georgia Bank on which the condominium is pledged as security;

(c) The parties agree that the payment of debts is pursuant to an equitable division on their assets and *shall not be considered alimony for any purpose* (emphasis added).

(Plaintiff's Ex. 1). Although Harrell requires that bankruptcy courts make an inquiry into whether or not the obligation is in the nature of support, in this Circuit, where the intent of the parties is clear and unambiguous from the face of the settlement agreement, no further investigation is necessary to constitute a "simple inquiry." *See Matter of Bond*, 1993 WL 72906 (Bankr. S.D.Fla.). In the present case, the settlement agreement drafted by Plaintiff's attorney clearly states that this obligation is an equitable division of assets and "shall not be considered alimony for any purpose." This language also is repeated in paragraph two entitled "Division of Personal Property." Accordingly, because the clear

intent of the parties as reflected and supported by the separation agreement was to characterize this obligation as a division of property and not in the nature of support this debt shall be deemed *prima facie* dischargeable.

Plaintiff has introduced no evidence to overcome this *prima facie* showing. None of the factors traditionally employed to show that an obligation is actually in the nature of support are present. The parties have no children from this marriage. The parties never resided in the condominium and used it solely for investment purposes. See In re Bedingfield, 42 B.R. 641 (S.D.Ga. 1983) (Edenfield, J.) (holding that debt was dischargeable after noting that (1) wife and children no longer resided in residence and (2) obligation remained even in the event of remarriage or death). Plaintiff lives and works in Atlanta and the condominium is located approximately two hundred and fifty miles away on St. Simons Island, Georgia. During the course of their marriage, Plaintiff was the "primary breadwinner" and although Debtor had a substantial salary at one time Plaintiff has not shown that at the time of the divorce Debtor intended to support or was even capable of supporting Plaintiff. See Id. There is no imbalance in income suggesting that wife was in need of support and that the obligation on this note was a substitute for monthly alimony. Thus, without any evidence to rebut the presumption that this debt is a property settlement, I hold that the debt is dischargeable pursuant to 11 U.S.C. Section 523(a)(5).

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS
THE ORDER OF THIS COURT that the Debtor's obligation to Plaintiff to pay an amount
equal to the second mortgage on Plaintiff's condominium under the divorce decree issued
on October 28, 1994, is discharged.

Lamar W. Davis, Jr.

United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of April, 1997.